STATEMENT OF THE CASE

In the early morning hours of January 6, 1987, Respondent Leamon White, along with Roger Buckner and Cleveland Ford, went to Donald Wright's house to buy crack cocaine. App. 9-10. Wright, his girlfriend Carol Kinney, and Ernest Black were at the house. App. 9-10. White and his companions brandished guns and demanded to know the location of the drugs and money. App. 9-10. White put his gun to Wright's head. App. 9-10. Wright said the drugs and money were not in the house. App. 9-10. White and his companions tied up Wright, Kinney, and Black in the front rooms and Kinney's two children, Deonta and Raymond Kinney (ages eight and seven, respectively), in a back bedroom. App. 9-10, 317-19. White repeatedly pistol-whipped Wright, all the while unsuccessfully interrogating him, and had either Buckner or Ford choke Wright. App. 9-10. White then declared that Wright, Kinney, and Black must die. App. 9, 12. White slit Wright's throat; his companions slit Kinney and Black's throats. App. 9-10. After turning on a gas stove and extinguishing its pilot lights, White, Buckner, and Ford left. App. 10. Wright died, but Black and Carol Kinney survived. App. 10.

White was convicted of murder in the first degree and sentenced to death in 1989. App. 1. Black and Carol Kinney testified for the State, identifying White as Wright's killer. App. 3, 10. White's defense was mistaken identity – that Wright's killer was a Jamaican drug dealer named A.J. Constantine. App. 3. Raymond Kinney, but not Deonta Kinney, testified for White. App. 3. Defense counsel did not interview or call Dorothy Merrell to the stand. App. 4. Merrell had said in a deposition that Constantine had threatened to kill her and her daughter in the past and had left her house, from which she sold crack cocaine, shortly before Wright was killed. App. 25-26.

White filed with the trial court a *pro se* motion for postconviction relief under Missouri Supreme Court Rule

29.15, raising twenty-nine distinct claims of ineffective assistance of counsel under the Sixth Amendment. App. 110, 479. The trial court appointed the state public defender's office to represent White. App. 110. White's first postconviction counsel secured a thirty-day extension to file an amended motion; the court set November 23, 1989, as the due date. App. 111. Counsel moved to withdraw, and simultaneously was replaced by new counsel. App. 126-27. Five days later, White executed two blank verifications of amended Rule 29.15 motions yet to be written. App. 111. Counsel prepared a first amended motion, which he untimely filed, on November 27, 1989. App. 112. Disregarding Rule 29.15(f), which authorizes a single extension of time to file an amended motion, counsel requested additional time to file a second amended motion. App. 112, 127, 219. After the request was granted, counsel filed a second amended motion. App. 112. The trial court denied White's motions. App. 112.

Two separate appeals to the Supreme Court of Missouri followed. App. 200, 212. The Court ultimately held that unauthorized withdrawal of White's first postconviction counsel and second postconviction counsel's filing of untimely amended motions amounted to abandonment, excusing the noncompliance with the time limitations on Rule 29.15. App. 222-24. As a remedy, the Supreme Court ordered the trial court to consider the claims raised in White's first, but not second, amended motion. App. 228. The Court noted that Rule 29.15 did not authorize a second extension to file a second amended motion. App. 215, 221-22. It agreed with the State that ordering appointment of new counsel and additional time to file a *third* amended motion – the remedy White sought – was inappropriate. App. 228. It was inappropriate because "White was only abandoned with regard to the timing of his first amended motion, not as to its content." App. 228. That is, neither White nor second postconviction counsel testified at the abandonment hearing (held in the trial court) that the first amended motion omitted grounds for relief known to White

when it was filed. App. 226. The Court noted that "[w]hen White signed the verification in blank [of the first amended motion], he waived all his rights to complain about its content." App. 220.

On remand, the trial court concluded that White had procedurally defaulted the claims raised in his *pro se* and first amended motion. App. 234-35. They were defaulted because White failed to plead facts, as required by Rule 29.15(e). App. 234-35. The trial court thus denied relief under Rule 29.15. App. 234-35. The denial was affirmed by the Supreme Court of Missouri. App. 260.

White filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the federal District Court for the Western District of Missouri. App. 1-2. The district court denied the petition. App. 1-2, 124. It concluded that White was procedurally barred from raising the majority of the claims he had raised in his first amended Rule 29.15 motion (because of his violation of Missouri's fact-pleading rule) and all the claims in his second amended Rule 29.15 motion (because under Missouri law that motion was improper). App. 128, 130-31. The district court found the adequacy of the Supreme Court of Missouri's abandonment remedy to be "beyond this Court's consideration." App. 150.

White appealed. The Eighth Circuit Court of Appeals held that the Supreme Court of Missouri's abandonment remedy was neither firmly established nor readily ascertainable and so an inadequate bar to review of the claims raised in White's petition. App. 115. Regarding the Missouri Supreme Court's distinction between abandonment as to timing and as to content, the Court of Appeals said

> the basis for the distinction is unclear to us . . . We cannot see why such an abandonment, forcing [] White's second attorney to prepare and write a motion in fourteen days would not include the content of the motion. [] White's attorney lacked the time to write a motion because he lacked the time to write its content.

> With no concern for content, one day would have been sufficient. . . . [W]e have no trouble finding that neither [] White nor his attorneys could reasonably have anticipated any such rule in advance of its first application in [] White's own case.

App. 115-16. The Court of Appeals did not dispute the State's contention that the remedy afforded White was consistent with prior state precedent. App. 116. "Even if, as Missouri argues, this rule forms a consistent pattern with prior precedent," the Court of Appeals held, "we could not apply it as a procedural default in this case." App. 116. The case was reversed and remanded "for consideration of [] White's constitutional claims, except those claims that the District Court has already addressed on the merits." App. 120. Petitioner unsuccessfully sought a writ of certiorari from this Court. See *Luebbers v. White*, 531 U.S. 917 (mem. Oct. 2, 2000).

After the district court decided the merits of only the claims White had (originally) raised in his second amended Rule 29.15 motion, White appealed. App. 63. The Court of Appeals acknowledged that its first opinion was unclear and that an assumption of the opinion ("that overcoming of the procedural rule barring the second amended motion would be determinative of the case") may have been "mistaken," because some of the claims in the second amended motion violated Missouri's fact-pleading requirement. App. 67. Invoking the law of the case, though, the Court held that the district court should have considered "all federal constitutional claims that have not previously been decided on the merits[,]" even if the claims were never raised in any of White's postconviction motions. App. 65, 67.

On remand, the district court held that trial counsel's inadequate investigation and failure to call two witnesses, Deonta Kinney and Dorothy Merrell, deprived White of his right to effective assistance under the Sixth and Fourteenth Amendments. App. 23-27 Deonta's testimony "would have implicated [a third person named] Constantine and exculpated

[White]" because he would have identified Constantine "as the man who entered with Buckner, and no plausible explanation has been offered as to why Deonta could not or should not have been called." App. 25. Dorothy Merrell's testimony would have "place[d] Buckner and Constantine together shortly before the crime." App. 26. The district court acknowledged that "Deonta was a young child, which may be a negative factor in his credibility," and that Merrell "was not an eyewitness to the crime, and her credibility may be suspect given that she was a crack dealer." App. 26. Still, the district court found, their testimony "may have changed the outcome," and it was "not confident in the jury's verdict and believe[d] there [was] a reasonable possibility that the outcome would have been different had Deonta and Dorothy testified." App. 26-27. So the district court (fourteen years after White was convicted) issued a writ of habeas corpus, vacating White's conviction and sentence. App. 61.

The Court of Appeals affirmed. App. 2. Regarding the strong presumption that trial counsel did not call Deonta and Merrell to testify because of sound trial strategy, the Court of Appeals said that "[t]he principle is certainly sound, but we disagree that it applies in this case." App. 5. Concluded the Court of Appeals: "[T]he district court properly found it inexplicable that only the boy with the weaker supporting testimony [i.e., Raymond Kinney] was called, rather than both [Raymond and Deonta Kinney], and properly found no apparent justification for failing to call [Dorothy] Merrell." App. 6. The Court of Appeals did not address petitioner's argument (repeated in his motion for rehearing) that Merrell's testimony would have been inadmissible under Missouri law. App. 457-59.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari because of the Court of Appeals' flawed ineffective-assistance-of-counsel analysis and misinterpretation of the adequacy prong of the adequate and independent state law doctrine – both of which are inconsistent with this Court's precedent. Regarding the former: the Court of Appeals held counsel ineffective for not trying to admit evidence inadmissible under a Missouri rule identical to the South Carolina rule currently before this Court; faulted counsel for doing a reasonable investigation, yet did not specify – as this Court and the federal (and state) courts of appeals require – what new and useful information counsel would have learned from a broader investigation; and required petitioner, in violation of *Strickland v. Washington*, 466 U.S. 668 (1984), to shoulder the burden of producing reasons why counsel did not call certain witnesses. Regarding the latter: the Court of Appeals' holding that a procedural bar was inadequate not because of the inadequacy of the bar itself, but because of inadequacy of the retroactive judge-created exception to the bar (an exception from which defendant had no legitimate expectation he would benefit) contravenes *Ford v. Georgia*, 498 U.S. 411 (1991).

I.

The Court of Appeals affirmed the district court's decision holding defense counsel ineffective for failing to conduct an adequate investigation and for not calling two witnesses, Deonta Kinney and Dorothy Merrell. This holding warrants further review for three reasons. First, this Court's precedent provides that defense counsel cannot be inadequate for not trying to admit inadmissible evidence. Merrell's testimony would have been inadmissible under a Missouri rule of evidence identical to the South Carolina rule whose constitutionality is before this Court. See *Holmes v. South*

Carolina, 126 S.Ct. 34 (Sept. 27, 2005). Second, the Court of Appeals' decision contravened *Strickland v. Washington*, 466 U.S. 668 (1984), in holding counsel's investigation to be unreasonable, and also created a circuit split in the federal courts of appeals. The other federal courts of appeals have consistently held that defense counsel conducts an inadequate investigation only if a more thorough investigation would have yielded additional information of assistance to the defense. The unique rule in the Court of Appeals eliminates the need to identify new information and how it would have helped the defendant. Third, in this Court and in the federal courts of appeals, the burden of disproving reasonable strategic reasons for not calling a witness rests on the defendant. The Court of Appeals shifted that burden to State. In any case, defense counsel had sound reasons not to call Deonta Kinney.

A. Defense counsel cannot be ineffective for not trying to present inadmissible testimony.

The Court of Appeals found defense counsel ineffective, in part, because he did not have Dorothy Merrell testify. App. 6. Merrell's testimony, according to the Court of Appeals, was "powerful" support for respondent's mistaken identity defense. App. 5. But Merrell's testimony would have been inadmissible under a Missouri rule of a evidence identical to the South Carolina rule whose constitutionality is before this Court in *Holmes v. South Carolina*, 126 S.Ct. 34 (cert. granted Sept. 27, 2005). Counsel cannot be ineffective for not trying to present inadmissible testimony. Compare *Wiggins v. Smith*, 539 U.S. 510, 535 (majority opinion) (2003) with *id.* at 554 (Scalia, J., dissenting); see also *United States v. Buchbinder*, 796 F.2d 910, 917 (7th Cir. 1986); cf. *Wood v. Bartholomew*, 516 U.S. 1, 5-7 (1995). This Court should hold this petition pending a decision in *Holmes v. South Carolina*.

Missouri's evidence law, like South Carolina's, provides that evidence implicating a third party in a crime is inadmissible

unless the evidence is "of the kind that directly connects the other person with the *corpus delicti* and tends clearly to point to someone other than the accused as the guilty person." Compare *State v. Rousan*, 961 S.W.2d 831, 848 (Mo. 1998) (en banc) with *State v. Holmes*, 361 S.C. 333, 342 (2004), *certiorari granted in part by Holmes v. South Carolina*, 126 S.Ct. 34 (Sept. 27, 2005). "Acts that are . . . outside the crime itself cannot be separately proved for such purpose." *State v. Wilson*, 105 S.W.3d 576, 583 (Mo. App. 2003). Given these rules of evidence, no Missouri court would have allowed Merrell to testify.

In her deposition, Dorothy Merrell, a crack cocaine dealer at the time of the attacks, identified a picture of A.J. Constantine as a person she knew as a Jamaican who went by the name "Jay" or "A.J." App. 283-84. She considered him dangerous because he had threatened to kill her daughter and her daughter's boyfriend, Benjamin Kinney (Carol Kinney's brother), the father of Merrell's grandchildren. App. 281-84. According to Merrell, Benjamin had used A.J.'s drugs, instead of selling them. App. 284. To protect her daughter and her daughter's boyfriend, Merrell said that she agreed to sell drugs for A.J. App. 284. The night of January 5, 1997, A.J. and Buckner came to her house looking for drugs, said Merrell, and made a deal with Wright (in the presence of Carol Kinney) to buy some drugs. App. 3, 290, 293. Merrell said that after making the deal and after Wright and Carol Kinney left Merrell's house, Buckner and A.J. left, saying they were going to get some drugs. App. 294. Merrell never said she saw where A.J. went after leaving her house, let alone that she had observed the attacks on Wright, Kinney, and Black.

Merrell's testimony would not clearly have pointed to A.J. Constantine as Wright's killer, as the Missouri (and South Carolina) rule requires. Merrell was not an eyewitness to the murder; nor did she see A.J. go in the direction of or arrive at or near Wright's house. App. 26. So her testimony does not even establish A.J.'s opportunity to commit the murder. Nor does

her testimony reveal A.J.'s motive for wanting to harm or kill Wright. True, Merrell's testimony showed that A.J. had (sometime in the past) threatened to kill Benjamin Kinney and his girlfriend (i.e., Merrell's daughter). But she never said A.J. had threatened to harm *Wright*.[1] Nay, she said that (1) it was Roger Buckner who told Benjamin Kinney that "he was there to kill us [Benjamin, his girlfriend, and Dorothy Merrell]" and (2) A.J. did not kill them, because "I [like Wright] didn't have any drugs in the house." App. 289. At most – and only by being overly charitable – Merrell's testimony would have indicated that A.J. had a (possible) motive and opportunity to harm Wright and Kinney. But such evidence by itself would have been inadmissible, because it does not clearly establish A.J. as Wright's murderer. See *State v. Wise*, 879 S.W.2d 494, 510-11 (Mo. 1994) (en banc); *Evans v. State*, 85 S.W.3d 750, 754 (Mo. App. 2002). Because Merrell's testimony would have been inadmissible, the Court of Appeals erred in faulting defense counsel for not trying to present it to the jury.

B. The Court of Appeals contravened *Strickland v. Washington* in interpreting the scope of defense counsel's investigative duties and in so doing created a circuit split.

The Court of Appeals held that defense counsel conducted a "superficial" investigation because counsel "did not interview Deonta Kinney and Dorothy Merrell, did not attend co-defendant Buckner's trial, and did not have copies of [Deonta and Raymond Kinney's] transcripts until the eve of trial." App. 4. Had counsel done these things, the Court of Appeals said, he would have discovered "important exculpatory information." App. 4. Thus, the Court of Appeals held that "the presumption

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[1]Merrell's testimony about A.J.'s threats was also inadmissible because it did not establish a threat to the victims, but to a third party. See *State v. Barriner*, 34 S.W.3d 139, 148 (Mo. 2000) (en banc).

of sound trial strategy [regarding the decision not to call Deonta Kinney and Dorothy Merrell] founders in this case on the rocks of ignorance as in *Wiggins v. Smith*, 539 U.S. 510, 527-28 (2003)." App. 6 (citation altered).

The Court of Appeals' decision is inconsistent with *Strickland v. Washington* and created a circuit split. There are two reasons why. One, defense counsel's investigation regarding Deonta and Raymond Kinney's likely testimony was reasonable, which is all *Strickland* requires. Two, an investigation cannot be inadequate unless a broader investigation would have yielded additional information of assistance to the defense. In all likelihood, no such information would have turned up had defense counsel done what the Court of Appeals said he should have done.

Criminal defendants are entitled to effective assistance of counsel under the Sixth Amendment. But "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam). One duty of effective counsel is to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 690-91). "[T]he duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 125 S.Ct. 2456, 2463 (2005); accord *United States v. Decoster*, 624 F.2d 196, 211 (D.C. Cir. 1976) (en banc) ("If given an unrestricted budget and freed of any constraints as to probable materiality or accountability, a lawyer might have cheerfully logged in many hours looking for the legal equivalent of a needle in a haystack. . . . . [A] defendant is not entitled to perfection but to basic fairness.").

Defense counsel's decisions not to interview or depose Deonta Kinney and not to attend co-defendant Buckner's trial (at which Deonta testified) were reasonable. See *Griffin v.*

Wainwright, 760 F.2d 1505 (11th Cir. 1985), *vacated on other grounds by Griffin v. Wainright*, 476 U.S. 1112 (1986); *Fynn v. State*, 763 S.W.2d 210, 211-12 (Mo. App. 1988). All the "important exculpatory" information with respect to Deonta was (*pace* the Court of Appeals) within the documents already in counsel's possession. Counsel had copies of the transcripts from the Buckner trial, including Deonta and Raymond's testimony; copies of their depositions; and copies of the police reports and their statements to the police. App. 23-24. Therein, the Kinneys go into great detail describing the attacks (to the extent they observed them) and the events surrounding the attacks. App. 299-455, 470-73. They describe, for instance, A.J.'s involvement in the Wright murder; in fact, Raymond identifies A.J. as the man who slit Wright's throat, though Deonta admits he did not see that happen. App. 374, 444-45.

It should not matter (as it did to the Court of Appeals) that counsel did not have the depositions until the "eve of trial." For that does not mean, and the district court never found, that counsel was unable to imbibe their contents; though thorough, the depositions were not voluminous. Nor should it matter that counsel did not attend co-defendant Buckner's trial. No case from this Court or the federal courts of appeals has held that defense counsel has a duty to attend the murder trial of a co-defendant (involving the same murder for which defendant is on trial). In fact, the Court of Appeals had previously rejected any such duty, in *Withram v. Mabry*, 596 F.2d 293, 299 (8th Cir. 1979), a case that goes unmentioned in the Court of Appeals' decision. In *Withram*, the Court of Appeals noted that the defendant had not "even intimated how the trial of his case was hindered by [counsel's] failure to attend [co-defendant's] trial. It was not an unreasonable decision for [counsel] to determine that his time . . . was better spent preparing for his client's case in some manner other than sitting through days of testimony." *Id.* The same is true of White's case.

The Court of Appeals attributes its disposition to *Wiggins v. Smith*, 539 U.S. 510 (2003). In *Wiggins*, this Court found

defense counsel's "cursory investigation" into a capital defendant's background was unreasonable and thus rebutted the presumption that the non-production of mitigating evidence during the penalty phase was the result of reasoned strategic judgment. *Id.* at 526-27. But "[t]he mitigating evidence counsel failed to discover and present . . . [was] powerful." *Id.* at 534. And counsel apparently failed to expand the investigation out of inattention, not strategic judgment. *Id.* at 526. Here, in contrast, the record indicates that counsel had ample information from which to make a sound decision whether to have Deonta (or Raymond) to testify. Cf. 539 U.S. at 524 (describing counsel's knowledge as "rudimentary").

In its willingness to fault defense counsel without identifying what benefit a more thorough investigation would have produced, the Court of Appeals contravened a long line of precedent from the federal courts of appeals and state appellate courts. That precedent establishes that an investigation cannot be inadequate unless a broader one would have yielded new information of help to the defense. See *Turner v. Williams*, 35 F.3d 872, 896 (4th Cir. 1994); *United States v. Ashimi*, 932 F.2d 643, 649 (7th Cir. 1991); *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986); *Jones v. Smith*, 772 F.2d 668, 674 (11th Cir. 1985); *United States v. Schaflander*, 743 F.2d 714, 718 (9th Cir. 1984); *United States v. Decoster*, 624 F.2d 196, 209 (D.C. Cir. 1976) (en banc); *Weaver v. State*, 114 P.3d 1039, 1043-44 (Mont. 2005); *Brown v. State*, 846 So.2d 1114, 1124 (Fla. 2003); *Rondon v. State*, 711 N.E.2d 506, 518 (Ind. 1999); *Lien v. Class*, 574 N.W.2d 601, 608 (S.D. 1998); *Commonwealth v. Haas*, 501 N.E.2d 1154, 1157 (Mass. 1986); *In re Personal Restraint of Pirtle*, 965 P.2d 593 (Wash. 1998).

The record, moreover, does not even hint that counsel would have learned anything useful had he broadened his investigation in the manner required by the Court of Appeals. Had counsel deposed or interviewed Deonta, it is unclear what questions he could have asked Deonta that Deonta had not already answered, except, "Are you sure?" See *State v.*

Thomas, 462 N.W.2d 862, 868 (Neb. 1990). Counsel's attendance at the Buckner trial would have given him an opportunity to gauge the credibility of the State's witnesses and of Deonta and Raymond by observing their demeanor. But that opportunity would have been of limited, and perhaps no, use. "[D]espite much lore to the contrary, it appears that it is actually more difficult to assess the credibility of oral than of written testimony." *Carradine v. Barnhart*, 360 F.3d 751, 753 (7th Cir. 2004) (Posner, J.) (citing research); Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991). Counsel wisely eschewed reading the tea leaves of demeanor and instead focused on Deonta and Raymond's written testimony.

C. The burden of disproving sound trial strategy was respondent's, not petitioner's.

In *Strickland v. Washington*, this Court established that the burden of disproving the existence of sound reasons for not calling witnesses rests on the defendant. 466 U.S. at 688-89; *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). Here, though, the Court of Appeals placed that burden on petitioner. It held that "the district court properly found it inexplicable that only the boy with the weaker supporting testimony was called, rather than both [Deonta and Raymond Kinney], and properly found no apparent justification for failing to call Merrell." App. 6. The Court of Appeals agreed with the district court that "no plausible explanation has been offered why Deonta [Kinney] could not or should not have been called." App. 25. Under *Strickland*, though, petitioner had no obligation to produce reasons why defense counsel decided not to call Dorothy Merrell and Deonta Kinney; nor did petitioner have to satisfy any purported "plausibility" burden. It was White's burden to disprove any reasonable grounds for not calling these witnesses. The Court of Appeals' decision to shift the burden merits review, if not reversal.

In fact, the record reveals an obvious reason not to call Deonta Kinney: He was less credible and knowledgeable than Raymond – or so competent counsel could conclude. Cf. *Yarborough*, 540 U.S. at 9 ("The issues counsel omitted were not so clearly more persuasive than those he discussed that their omission can only be attributed to a professional error of constitutional magnitude."). In his deposition, Raymond said that he had seen portions of the attacks (having peeked into the front rooms where they took place), and saw A.J. slit Wright's throat. App. 441-44. Afterward, he woke up Deonta, who, scared, got back in bed and pretended to be asleep. App. 367. (Raymond had insomnia, whereas Deonta had no trouble falling asleep. App. 363.) Deonta specifically denied having seen Wright get attacked. App. 374 ("Q: Did you see the man cut [Wright's] throat? A: No.").

Deonta occasionally jumbled together different events, in the process confusing the questioner. App. 360, 373 ("Q. Now, you've jumped ahead of me quite a bit there. I was talking about the three men that were over at Bam's."; "I want to try to get this in order, I mean, what happened first and then happened second and then third. Okay?"). Deonta, who was eight years old at the time of the attacks, was also "shy and scared" during the police's interview of him; there is no such indication regarding Raymond. App. 470.

Deonta's recollection of events was at times implausible. He said that police cars had been driving up and down the street outside his uncle's house (where he was staying); that a helicopter was flying overhead, shining a spotlight on the house; and that the dealers at his uncle's, afraid the police might barge in, burned up some cocaine in an oven. App. 354-56. No other witness recalled such salient events. Deonta said that, after the attackers left, he asked Ernest Black what happened, and Black said, "The fat, chubby one hit me with a gun." App. 383. The phrase, "the fat, chubby one," was his and his brother's. It is unlikely that Black, an adult who (according to the defense) knew his attacker, would describe him as "the fat,

chubby one." Deonta also purported to remember things that a child probably would not – for instance, that his mother (Carol Kinney) had called him at exactly 9:06 p.m. (this despite all the exciting activities taking place at his uncle's). App. 353.

Deonta's deposition and trial testimony was also internally inconsistent. At first, he said that only one of the three men who were at his uncle's house, and later at Wright's, spoke with a Jamaican accent. App. 357-59. Then he said two did. App. 357-59. Asked whether he was sure the three men at Wright's house were at his uncle's, he said yes, but then retracted that statement by saying, "Yes, they might be." App. 361. Deonta also equivocated about whether the man he knew as A.J. and saw at Wright's house had been at his uncle's house earlier in the day, stating that he "looked exactly like the one that came to our house." App. 361. Initially, Deonta said that when he saw A.J. at his uncle's house A.J. had on dress pants and a dress shirt; later he said he could not remember what A.J. had been wearing; still later, he said that A.J. was wearing jeans at his uncle's. App. 368, 377. Deonta said that A.J. had a Jerri curl (a hairstyle); later, he said that A.J. did not have a Jerri curl; still later, he could not remember whether any of the men in Wright's house had a Jerri curl. App. 327, 337-39, 384-85. In his deposition, he said a man with a Jerri curl retrieved a knife from the kitchen; in his testimony at the Buckner trial, he said a man with a "natural hairdo" retrieved the knife. App. 319, 376.

Not only was Raymond the more credible and knowledgeable witness; the jury had already learned about Deonta's identification of Constantine from another witness. Detective Lee Floyd testified that, while interviewing Deonta regarding the attacks, Deonta selected and recognized Constantine's picture out of an array of photos. App. 487. Also, Deonta's testimony likely would have *undermined* White's mistaken-identity defense. The Court of Appeals, like the district court, placed great importance in Deonta's willingness to identify Constantine as the attacker. But

Detective Floyd testified that Deonta had *denied* that Constantine was one of the assailants at Wright's house. App. 487. Deonta had also said that, though he had picked out A.J.'s (i.e., Constantine's) picture, he did not have a chance to look at the pictures "real well"; that he never got a good look at the men who were at his uncle's house; and that he did not know whether any of the other men in the photo lineup, including Roger Buckner (who was sentenced to life imprisonment for his involvement in Wright's murder), was at Wright's house. App. 326, 398, 426. And, as noted before, Raymond, not Deonta, had seen Wright get his throat slit. Moreover, even if Deonta were as credible and knowledgeable as Raymond, his testimony was essentially redundant. See *Clabourne v. Lewis*, 64 F.3d 1373, 1382 (9th Cir. 1995) (Kozinski, J.). To get an acquittal, defense counsel only needed to convince the jury that White was not at Wright's house when the murder took place. He did not have to prove that a specific third party (here, Constantine) committed the crime. Faulting defense counsel for not trying to prove two propositions when proof of one would result in acquittal is perverse. In any event, the district court should have held that White was estopped to complain about his counsel's decision not to call Deonta. Under oath, White said he agreed with counsel's decision not to call Deonta to the stand, and that counsel and he had gone over the reasons pro and con regarding having Deonta testify. App. 466-67; see *Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."). But again, under *Strickland*, it was not petitioner's burden to produce reasons, let alone convincing ones, for not having Deonta testify. See also *United States v. Schmidt*, 105 F.3d 82, 90 (2nd Cir. 1997) ("[T]he tactical decision of whether to call specific witnesses – even ones that might offer exculpatory evidence – is ordinarily not viewed as a lapse in professional representation."). The Court of Appeals should not be allowed to reject *Strickland* and foist that burden on the petitioner.

II.

The Court of Appeals held that Missouri's abandonment remedy (allowing consideration of White's claims in his first, but not second, amended motion) was an inadequate bar to federal habeas review. That decision contravenes *Ford v. Georgia*, 498 U.S. 411 (1991), improperly expanding the scope of the adequacy requirement of the independent and adequate state law doctrine. Even on its own terms, the Court of Appeals' adequacy analysis is flawed. White had no legitimate expectation that the Supreme Court of Missouri would allow him to avail himself of the abandonment doctrine. And the abandonment remedy afforded White was mandated by precedent preceding White's first postconviction appeal and by routine remedial principles.

A. The Court of Appeals' adequacy analysis is inconsistent with this Court's precedent.

In *Ford v. Georgia*, this Court held that a state procedural rule, which the Supreme Court of Georgia invoked *sua sponte* to bar consideration of a *Batson* claim, was an inadequate bar to habeas review. 498 U.S. at 417, 425. The procedural rule required that *Batson* claims be raised "not only before trial, but in the period between the selection of the jurors and the administration of their oaths[.]" Though "sensible," the rule was an inadequate bar because, this Court held, it was not firmly established and regularly followed. *Id.* at 422-24. That is, at the time of Ford's trial, the rule did not exist; the Supreme Court of Georgia adopted it two years later, in *State v. Sparks*, 355 S.E.2d 658, 659 (Ga. 1987). 498 U.S. at 424. Concluded this Court:

> To apply *Sparks* retroactively to bar consideration of a claim not raised between the juror's selection and oath would therefore apply a rule unannounced at the time of petitioner's trial and consequently inadequate to serve

> as an independent state ground within the meanings of [*James v. Kentucky*, 466 U.S. 341 (1984)]. Indeed, the Georgia court itself in *Sparks* disclaimed any such effect for that decision.

498 U.S. at 424.

Here, in contrast to *Ford*, the state procedural rule barring habeas review of the claims in White's second amended motion, Rule 29.15, was firmly established and regularly followed at the time of White's postconviction proceedings. Missouri case law had held that Rule 29.15's requirements, in particular its time limitations, see Rule 29.15(b), (f), were "valid and mandatory," *Day v. State*, 770 S.W.2d 692, 695 (Mo. 1989) (en banc); all claims raised in an untimely postconviction motion (amended or not) were waived. *Id.*; *Sloan v. State*, 779 S.W.2d 580, 581-82 (Mo. 1989) (en banc), *abrogated on other grounds by Sanders v. State*, 807 S.W.2d 493, 494, 494 n.1 (Mo. 1991) (en banc); *Luster v. State*, 795 S.W.2d 109, 111 (Mo. App. 1990); see also *Rice v. State*, 779 S.W.2d 771, 775 (Mo. App. 1989). So it was well established that when White filed his untimely amended motions (on November 27, 1989, and January 9, 1990) he waived the claims in both.

The Court of Appeals did not disagree. Its sole complaint concerned the adequacy of the abandonment remedy crafted by the Supreme Court of Missouri to *excuse* White's procedural default. But the independent and adequate state law doctrine bars review of a question of federal law if the decision of the state court rests on a state law ground independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). That doctrine does not concern itself with the adequacy of a state court's retroactive application of a judge-created exception to a procedural bar. Cf. Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1141 (1986). ("[N]o case has held that a state procedural ground is inadequate simply because the state court possessed but did not exercise discretion to excuse the procedural default."). The Court of Appeals'

decision creates a conceptual confusion – an exception to a procedural bar is deemed inadequate, though the exception does not bar a petitioner's claims, but rather allows consideration of (some) claims.

B. Respondent had no reason to anticipate the retroactive application of a judge-created exception to his state procedural default.

The justification for the *Ford* decision is that the rules of the judicial game should not change in the middle of the game to the detriment of the defendant. But the Court of Appeals stands *Ford* on its head. Neither at the time of White's postconviction proceedings (the relevant period for a postconviction rule, such as Rule 29.15, see *Ford*, 498 U.S. at 424) nor during his appeals to the Supreme Court of Missouri did White have a legitimate expectation that the doctrine of abandonment would apply to his case. So the adequacy of the abandonment remedy crafted by the Supreme Court of Missouri was irrelevant.

The doctrine of abandonment did not exist during the pendency of White's postconviction proceedings in the trial court. Before and after White filed his Rule 29.15 motions, Missouri courts had rejected abandonment by postconviction counsel as an excuse for noncompliance with the requirements of Missouri's postconviction rules (such as Rule 29.15). See *State v. Berry*, 798 S.W.2d 491, 495 (Mo. App. 1990); *Crandall v. State*, 785 S.W.2d 780, 781 (Mo. App. 1990); *Evans v. State*, 782 S.W.2d 402, 403-04 (Mo. App. 1989). Not until June 19, 1990 – nearly five months after White filed his second amended motion – did the Supreme Court of Missouri opine that it might be possible to excuse the untimely filing of an unverified amended motion if the untimeliness was "not attributable to movant's intentional or negligent conduct and was due entirely to an ambiguity in [Rule 29.15]." *Kilgore v. State*, 791 S.W.2d 393, 396 (Mo. 1990) (en banc). Not until April 9, 1991, long after the trial court first disposed of White's

motions, did the Supreme Court of Missouri hold that abandonment by postconviction counsel warranted excusing noncompliance with Rules 29.15(e) and (f). See *Sanders*, 807 S.W.2d at 493; *Luleff v. State*, 807 S.W.2d 495 (Mo. 1991) (en banc). "Until today," said the Supreme Court of Missouri, "this Court has not deviated from its firm position that failure to timely file a motion constitutes a complete bar to consideration of a movant's claims, even when the claims are attributable entirely to inaction of counsel." *Sanders*, 807 S.W.2d at 494 (collecting cases).[2]

There are other reasons why White had no legitimate expectation that the Supreme Court of Missouri would allow him to benefit from the abandonment doctrine. In general, and particularly in the context of a Rule 29.15 action, Missouri prohibits the raising of claims on appeal not first presented to the trial court. See, *e.g.*, *Clemmons v. State*, 795 S.W.2d 414, 418 (Mo. App. 1990). White raised abandonment for the first time on appeal; that was improper. See *Johnson v. State*, 768 S.W.2d 158, 160 (Mo. App. 1989). Moreover, because *Sanders* and *Luleff* did not say whether the abandonment doctrine would apply retrospectively and because abandonment is a procedural rule (for it merely excuses noncompliance with Rule 29.15's procedural requirements), see *State v. Callen*, 45 S.W.3d 888, 890 (Mo. 2001) (en banc); *Boydston v. State*, 26 S.W.3d 845, 847 (Mo. App. 2000); *State v. Ford*, 867 S.W.2d 681, 684 (Mo. App. 1993), a reasonable attorney would have predicted that the Supreme Court of Missouri would not apply it (retroactively) to White's case. See *State v. Walker*, 616 S.W.2d 48, 49 (Mo. 1981) (en banc). Far from setting "springes . . . for those who are endeavoring to assert rights," as

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[2] *Luleff* also held "that the appropriate forum for addressing claims regarding a complete absence of performance by postconviction counsel on a motion for postconviction relief [i.e., an abandonment claim] is in the [trial] court where the motion is being prosecuted by movant." 807 S.W.2d at 497. White argued abandonment for the first time on appeal.

the Court of Appeals put it, App. 115 (internal quotation marks omitted), the Supreme Court of Missouri conferred a windfall on White.

White's case is the converse of *Lee v. Kemna*, 534 U.S. 362 (2002). In *Lee*, this Court held two Missouri procedural rules (Rules 24.09 and 24.10) inadequate because of the "extraordinary circumstances" under which they were applied. *Id.* at 376. The rules were invoked – for the first time on appeal – as a bar to Lee's due process claim. *Id.* at 380. And "no published Missouri decision direct[ed] flawless compliance with Rules 24.09 and 24.10 in the unique circumstances [of Lee's case]." *Id.* at 382. In contrast, White had adequate notice of the procedural bar here (Rule 29.15's timing requirements). Whereas Lee was harmed by the raising of procedural rules for the first time on appeal, White benefitted from a procedural-rule exception raised for the first time on appeal – an exception that did not exist at the time of White's postconviction proceedings in the trial court, but that should have been, but was not, raised then. If a habeas petitioner's attempt to seek review of a claim should not be frustrated by the unexpected application of a trial-court rule applied for the first time on appeal, neither, by parity of reasoning, should a habeas petitioner be heard to complain about the inadequacy of the unexpected application for the first time on appeal of an exception to a trial-court rule.

C. The scope of the abandonment remedy deemed unprecedented by the Court of Appeals was mandated by established state precedent and ordinary remedial principles.

The Court of Appeals erred in holding that the Supreme Court of Missouri's abandonment remedy (consideration of the claims in the first, but not second, amended Rule 29.15 motion). That remedy was mandated by state precedent and ordinary remedial principles, in contrast to the remedy White sought (appointment of new counsel and the time to file a third

amended motion). So the Court of Appeals' adequacy analysis is wrong by its own terms.

As the Supreme Court of Missouri noted, the abandonment remedy afforded White was identical to that in *Sanders v. State*, 807 S.W.2d 493 (Mo. 1991) (en banc). App. 223. There, postconviction counsel abandoned the movant by filing an amended Rule 29.15 motion out of time. *Id.* at 494. "[W]here the record reflects that counsel has determined that there is a sound basis for amending the *pro se* motion but fails to timely file the amended motion as required by Rule 29.15(f)," the Supreme Court held, "[t]he failure is, in effect, another form of 'abandonment' by postconviction counsel." *Id.* at 494-95. Hence, "[s]hould the failure to file a timely amended motion result from inattention of counsel, the court shall permit the filing." *Id.* at 495. Here, as in *Sanders*, White was abandoned by postconviction counsel's filing of an untimely first amended motion.

The remedy that White sought, that the Supreme Court of Missouri declined to grant, but that the Court of Appeals (tacitly) deemed the norm (appointment of new counsel and time to file another amended motion) would have been unprecedented. That remedy was the remedy granted the movant in *Luleff v. State*, 807 S.W.2d 495 (Mo. 1991) (en banc) But in *Luleff* the movant had been abandoned by the "complete absence of performance by postconviction counsel[.]" 807 S.W.2d at 497. Counsel never entered his appearance, never communicated with his client, never filed an amended motion. *Id.* at 498. White's counsel did not completely abdicate his responsibilities – he met with White and filed two amended motions, raising multiple claims of ineffective assistance.

Two years before the Supreme Court of Missouri held that White had been abandoned, it rejected an abandonment-remedy argument identical to White's. In *State v. Ervin*, postconviction counsel filed an untimely amended Rule 29.15 motion. 835 S.W.2d 905, 928 (Mo. 1992) (en banc). Notwithstanding the

motion's untimeliness, the trial court held a hearing on the movant's claims. *Id.* On appeal to the Supreme Court of Missouri, the movant insisted that the proper remedy for his abandonment by postconviction counsel was appointment of new counsel, time to file a new and timely amended motion. and a hearing on the new motion. *Id.* Not only did the Court disagree (citing *Sanders*, as did the Court in White's case); it branded the movant's argument "odd[.]" *Id.*

Nor was White's case factually unique. In *Pollard v. State*, 807 S.W.2d 498 (Mo. 1991) (en banc) – decided the same day as *Sanders* and *Luleff* and three months before the Supreme Court disposed of White's first postconviction appeal – the Supreme Court ratified the identical remedy for a Rule 29.15 movant in the same position as White. The movant in *Pollard* filed a pro se Rule 29.15 motion; postconviction counsel requested a thirty-day extension (which was granted), did not file an amended motion, and was replaced by different counsel, who filed an untimely amended motion. *Id.* at 500. The case is factually indistinct from White's, with the sole exception that the trial court had considered the claims raised in the movant's untimely amended motion. *Id.* The movant, citing *Sanders* and *Luleff*, claimed that he had been abandoned by postconviction counsel. *Id.* at 502. The Supreme Court agreed, but concluded that the movant suffered no prejudice because the trial court considered the claims in the untimely amended motion. In short, *before White's case ever wended its way before the Supreme Court of Missouri*, that Court had approved the very remedy White received in a case factually identical to White's. The Court of Appeal's conclusion that the remedy afforded White was unpredictable was wrong.[3]

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[3]Granted, the Supreme Court of Missouri did hold that White's first postconviction counsel abandoned him by withdrawing without leave of court. But hitherto no Missouri court had ever held or implied that unauthorized withdrawal of postconviction counsel – much less withdrawal and immediate replacement by another attorney – constituted abandonment.

The Supreme Court of Missouri's abandonment remedy was also consistent with routine remedial principles. It is a well-known principle of equity that the nature of the wrong determines the scope of relief. *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 16 (1971). The harm caused by postconviction counsel's abandonment of White was the untimely filing of a first amended motion. The harm was not, as the Eight Circuit implied, the inability of White to raise all the claims he wanted to raise. As the Supreme Court of Missouri noted, neither White nor his second postconviction counsel complained of insufficient time to raise all White's grounds for relief in the first amended motion. Not until the district court proceedings did White contend otherwise. And by executing the blank verifications, White, as the Supreme Court of Missouri held, waived any claims not included in his first amended motion. See Rule 29.15(b) ("The movant shall verify the motion, declaring that he has listed all grounds for relief known to him and acknowledging his understanding that he waives any ground for relief known to him that is not listed in the motion."). Allowing consideration of White's second amended motion would have rewarded White's inequitable conduct (i.e., his false verifications), in violation of the hoary maxim, which Missouri has long followed, that a seeker of equity must have clean hands. See *Colbert v. Nichols*, 935 S.W.2d 730, 734 (Mo. App. 1996); see

---

A new form of abandonment was created in White's appeal. Because it was new, it follows that White had no expectation that he could benefit from it. The adequacy of the remedy for this form of abandonment was thus irrelevant. Also notable is that since White's case no Missouri court has recognized unauthorized withdrawal of postconviction counsel as abandonment. In fact, the Supreme Court of Missouri has repeatedly held that there are only two forms of abandonment (*Luleff* and *Sanders* abandonment), and has refused to mint new forms. *Barnett v. State*, 103 S.W.3d 765, 773-74 (Mo. 2003) (en banc) (collecting cases); but cf. *State v. Bradley*, 811 S.W.2d 379, 384 (Mo. 1991) (unverified amended motion; remanding for abandonment hearing).

also *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889) ("No one shall be permitted to profit by his own fraud.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center
Petitioner,

v.

LEAMON WHITE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION
VOL. 1 OF 3

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United States Court of Appeals,
Eighth Circuit

Leamon WHITE, Petitioner--Appellee,

v.

Don ROPER, Respondent--Appellant.

No. 04-2772.

Submitted: May 11, 2005.
Filed: Aug. 2, 2005.
Rehearing and Rehearing En Banc Denied Sept. 9, 2005. *

Charles W. Gordon, Jr., argued, Kansas City, MO (Ronald E. Partee on the brief), for appellee.

Before LOKEN, Chief Judge, BEAM and MELLOY, Circuit Judges.

LOKEN, Circuit Judge.

Leamon White was convicted of first-degree murder and sentenced to death by a Missouri state court in 1989. The Supreme Court of Missouri affirmed his conviction and sentence and the denial of state post-conviction relief. *State v. White*, 813 S.W.2d 862 (Mo. banc 1991), *cert. denied*, 502 U.S. 1103, 112 S.Ct. 1193, 117 L.Ed.2d 434 (1992); *State v. White*, 873 S.W.2d 590 (Mo. banc 1994); *White v. State*, 939 S.W.2d 887 (Mo. banc), *cert. denied*, 522 U.S. 948, 118 S.Ct. 365, 139 L.Ed.2d 284 (1997). White then filed this petition for a federal writ of habeas corpus, which the district court denied. White

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*Judge Benton took no part in the consideration or decision of this matter.

appealed, and we held that certain constitutional issues were not procedurally barred from federal habeas review. *White v. Bowersox*, 206 F.3d 776 (8th Cir.), *cert. denied*, 531 U.S. 917, 121 S.Ct. 275, 148 L.Ed.2d 200 (2000). After a second appeal, we concluded that the district court had misconstrued our prior remand order. We again remanded the case, directing the court "to decide on their merits all claims alleged in the petition for writ of habeas corpus, not previously decided on their merits." *White v. Luebbers*, 307 F.3d 722, 731 (8th Cir.2002), *cert. denied*, 538 U.S. 981, 123 S.Ct. 1785, 155 L.Ed.2d 671 (2003).

On remand, the district court[1] held an evidentiary hearing on the remaining claims. In a thorough opinion, the court granted the writ, concluding that White's trial counsel provided ineffective assistance in failing to investigate and present exculpatory testimony by two witnesses in the guilt phase, and in failing to present mitigating evidence in the penalty phase. The State of Missouri appeals only the guilt phase determination, conceding that White is entitled to penalty phase relief. On appeal, the State argues that White failed to demonstrate counsel's constitutionally deficient performance, and that the district court misapplied the prejudice standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Because the Supreme Court of Missouri did not rule on the merits of this ineffective assistance claim after an evidentiary hearing, there is no state court ruling to which we must defer under 28 U.S.C. § 2254(d). After careful review of the record, we affirm.

I.

---

[1]The HONORABLE ORTRIE D. SMITH, United States District Judge for the Western District of Missouri.

We briefly recite the facts critical to this appeal; additional background facts were detailed in our earlier opinions. In the early morning hours of January 6, 1987, three men went to the home of Don Wright and his girlfriend, Carol Kinney, to obtain crack cocaine. The trio murdered Wright and attempted to murder Kinney and a guest, Ernest Black. Kinney and Black survived and identified White as one of the three perpetrators at trial. The other two assailants were Roger Buckner, who was found guilty after a bench trial in which the death penalty was waived, and Cleveland Ford, who pleaded guilty to a non-capital offense. White's defense at trial was that Kinney and Black were mistaken in identifying White and that the third assailant was in fact a Jamaican drug trafficker named A.J. Constantine. Though other witnesses linked White to Buckner and Ford and tended to support the testimony of Kinney and Black, no physical evidence linked White to the crime scene.

Kinney's two young sons, Deonta and Raymond, were in the house at the time of the crime and saw the assailants. Both boys testified at Buckner's trial, which took place prior to White's trial. Both boys testified that one assailant spoke with a Jamaican accent and was known as "A.J." Deonta identified a picture of Constantine as A.J. Raymond could not identify the picture of Constantine as A.J. At White's trial, Raymond was called as a defense witness. He testified that White was not an assailant but again could not identify Constantine as the third killer. Deonta was not interviewed by trial counsel and did not testify. He would have testified that White was not an assailant *and* would have identified Constantine as the third killer.

Earlier on the night of the murder, the victims of the attack--Wright, Carol Kinney, Black, Deonta, and Raymond--were at the home of Dorothy Merrell and Carol's brother, Ben Kinney, who ran a crack house. In the district court's evidentiary hearing, Merrell testified that Buckner and a companion arrived looking for drugs while the others were there. Wright said he

had drugs at his house and arranged to meet with Buckner at Wright's house later that night. Merrell testified that Buckner's companion was a Jamaican named Jay or A.J. Constantine. Similarly, Deonta told police after the attack that A.J. had been with Buckner at Merrell's house before the two came to Wright's house. Neither Deonta nor Mrs. Merrell knew White, and neither saw him on the night of the murder. Merrell was neither interviewed by defense counsel nor called as a witness at White's trial.

White's trial counsel, Robert Duncan, died in 1996, before the district court's evidentiary hearing. Second chair John O'Connor and Duncan's son, the defense investigator, both testified at the hearing. The district court concluded that counsel failed to conduct an adequate investigation because Duncan did not interview Deonta Kinney and Dorothy Merrell, did not attend Buckner's trial, and did not have copies of the boys' deposition transcripts from Buckner's case until the eve of trial. Lacking this important exculpatory information, counsel failed to call these two witnesses, who would have directly supported the defense theory of mistaken identification:

> Deonta's testimony directly implicated Constantine and exculpated [White]. Deonta's identity was known to counsel, a reasonable investigation would have revealed his identification of Constantine as the man who entered with Buckner, and no plausible explanation has been offered as to why Deonta could not or should not have been called.
>
> Coupled with this failure is the failure to call Dorothy Merrell ("Dorothy") to testify.... Dorothy identified Constantine's picture as a person she knew as a Jamaican drug dealer who went by the name "Jay" or "A.J." ... Her testimony places Buckner and Constantine together shortly before the crime, and describes

> circumstances that led to Buckner's and Constantine's departure to Wright's house. Dorothy's potential for having information was known to counsel .... *White v. Roper*, No. 97-1663, slip op. at 15-16 (W.D. Mo. June 14, 2004). The district court concluded that, by failing to investigate and call these two critical witnesses, "trial counsel's performance was so deficient as to fall below an objective standard of reasonable competence," and this deficient performance prejudiced White's defense. *Nave v. Delo*, 62 F.3d 1024, 1035 (8th Cir.1995) (quotation omitted), *cert. denied*, 517 U.S. 1214, 116 S.Ct. 1837, 134 L.Ed.2d 940 (1996).

On appeal, the State argues that the district court's decision is contrary to the principle that trial counsel's failure to call witnesses, in this case Deonta Kinney and Dorothy Merrell, is presumed to be reasonable trial strategy. *See Fretwell v. Norris*, 133 F.3d 621, 627 (8th Cir.), and cases cited, *cert. denied*, 525 U.S. 846, 119 S.Ct. 115, 142 L.Ed.2d 92 (1998). The principle is certainly sound, but we disagree that it applies in this case. The strength of the presumption turns on the adequacy of counsel's investigation:

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

Strickland, 466 U.S. at 690-91, 104 S.Ct. 2052. Here, the record establishes that counsel's investigation was too superficial to reveal the comparative strength of Raymond's and Deonta's support for the defense of mistaken identification, and to discover the powerful support that Dorothy Merrell could provide for the defense that Constantine was the third assailant.

In these circumstances, the district court properly found it inexplicable that only the boy with the weaker supporting testimony was called, rather than both, and properly found no apparent justification for failing to call Merrell. In other words, the presumption of sound trial strategy founders in this case on the rocks of ignorance, as in *Wiggins v. Smith*, 539 U.S. 510, 527-28, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

II.

The State further contends that the district court misapplied *Strickland*'s prejudice standard in concluding: "Ultimately, the Court is not confident in the jury's verdict and believes there is a reasonable *possibility* that the outcome would have been different had Deonta and Dorothy testified." *White v. Roper*, slip. op. at 16 (emphasis added). The State properly notes that the *Strickland* prejudice standard requires proof of a reasonable *probability* and argues that the difference in terminology is significant enough to constitute reversible error.

Initially, we note that the district court, just three pages earlier in its 46-page opinion, stated the correct "reasonable probability" standard three times and quoted the Supreme Court's summary of that standard. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527, quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The district court recognized *Strickland* as the governing authority and framed its analysis accordingly. The court focused on the ultimate *Strickland* prejudice inquiry when it concluded, taking into account the omitted testimony of Deonta Kinney and Dorothy Merrell, that it was "not confident in the jury's verdict." Thus, despite one mistake in the court's opinion, we are satisfied that it knew and correctly applied the familiar *Strickland* prejudice standard.

In resolving a similar issue in *Woodford v. Visciotti*, 537 U.S. 19, 23-24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002), the Supreme Court observed:

> The California Supreme Court's opinion painstakingly describes the *Strickland* standard. Its occasional shorthand reference to that standard by use of the term "probable" without the modifier may perhaps be imprecise, but if so it can no more be considered a repudiation of the standard than can this Court's own occasional indulgence in the same imprecision.

Although the district court in this case used the wrong word, rather than an imprecise shorthand, like the Supreme Court in *Woodford* we conclude that the district court's single mistake in articulating the *Strickland* prejudice standard was not a repudiation of that standard. Therefore, on this record, we affirm the court's conclusion that White is entitled to guilt phase habeas relief under *Strickland* because he proved that he was prejudiced by counsel's deficient performance.

The judgment of the district court is affirmed.

(Jul. 21, 2004)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LEAMON WHITE,	*
	*
Petitioner,	*
	*
v.	*
	*
DON ROPER,	*
Superintendent,	*
	*
Respondent.	*

ORDER GRANTING IN PART AND DENYING IN PART PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS

It would be an understatement to describe the procedural history of this case as "lengthy." It has been considered by the Missouri Supreme Court on three occasions and by both this Court and the Eighth Circuit Court of Appeals on two occasions each. In its most recent decision, the Eighth Circuit remanded the case for consideration of the merits of all claims that the undersigned had previously held were procedurally defaulted. The claims Petitioner originally advanced now fall into four categories: (1) claims denied on the merits, the denial of which were affirmed on appeal; (2) claims denied on the merits which were not appealed because the Court declined to include them in the Certificate of Appealability; (3) claims denied on procedural grounds and require an evidentiary hearing to resolve; and (4) claims denied on procedural grounds which do not require an evidentiary hearing to resolve. An evidentiary hearing was held January 14 – 16, 2004, and at the Court's request the parties have submitted proposed findings of fact and